No. 95-928

In the Supreme Court of the United States

OCTOBER TERM, 1995

JOHN W. ATHERTON, JR., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, AS RECEIVER FOR CITY SAVINGS, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

WILLIAM F. KROENER, III
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
JEROME A. MADDEN
Counsel
Federal Deposit Insurance Corporation
Washington, D.C. 20429

QUESTION PRESENTED

Whether Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, 12 U.S.C. 1821(k), displaced the FDIC's right, as receiver, to assert a failed depository institution's own federal common law claims against its former officers or directors.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-928

JOHN W. ATHERTON, JR., ET AL., PETITIONERS

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
AS RECEIVER FOR CITY SAVINGS, F.S.B.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A50) is reported at 57 F.3d 1231. The opinion of the district court (Pet. App. A65-A67) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1995. A petition for rehearing was denied on September 14, 1995. Pet. App. A54-A56. The petition for a writ of certiorari was filed on December 12, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. City Federal Savings Bank (City Fed) was a federally chartered, federally insured savings bank located in Bedminster, New Jersey. On December 7, 1989, the Director of the Office of Thrift Supervision (OTS) declared City Fed insolvent and appointed the Resolution Trust Corporation (RTC) as its receiver. Under 12 U.S.C. 1821(d)(2)(A), the RTC succeeded to all of City Fed's rights, titles, powers, and privileges, including any civil damage claims that the institution may have had against its own former directors and officers.[1] Through a series of transactions, City Fed's assets were transferred to a newly chartered federal savings bank, City Savings, F.S.B, which, on January 11, 1991, was itself placed into an RTC receivership.

In its capacity as receiver for City Savings, the RTC filed suit against several of City Fed's former directors and officers (including petitioners), alleging breach of fiduciary duty, negligence and gross negligence under state law and federal common law. The RTC claimed that the defendants failed to exercise appropriate care in their consideration, approval, and oversight of several large acquisition, development, and construction loans, which ultimately defaulted,

[1] The RTC had the same powers and rights to carry out its functions as the Federal Deposit Insurance Corporation (FDIC) has under Sections 1821, 1822, and 1823 of Title 12. 12 U.S.C. 1441a(b)(4)(A). On December 31, 1995, the RTC terminated, in accordance with the provisions of the Resolution Trust Corporation Completion Act, 12 U.S.C. 1441a(m)(1). The RTC was succeeded in its capacity as receiver by the FDIC. 12 U.S.C. 1441a(b)(4)(A).

resulting in losses to City Fed of more than $100 million. Pet. App. A11.

The district court granted petitioners' motion to dismiss. Pet. App. A57-A64. The parties agreed that, because City Fed was a federally chartered institution, federal law governed its internal affairs and supplied the standards that governed its officers' and directors' liability. *Id.* at A61. The court concluded that Section 212(a) of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), 12 U.S.C. 1821(k), which authorizes suit by the federal receiver for gross negligence, provides a uniform standard of liability that governs all claims brought by the RTC against former directors or officers of federally chartered depository institutions. Pet. App. A61-A64.[2] The court, however, granted the RTC's motion to certify its order of dismissal for interlocutory appeal under 28 U.S.C. 1292(b). Pet. App. A66.[3]

The court of appeals granted the petition for interlocutory review, Pet. App. A68, and consolidated the

[2] Section 1821(k) provides in relevant part as follows:

> A director or officer of an insured depository institution may be held personally liable for monetary damages * * * for gross negligence, including any similar conduct or conduct that demonstrates a greater disregard of a duty of care (than gross negligence) including intentional tortious conduct, as such terms are defined and determined under applicable State law. Nothing in this paragraph shall impair or affect any right of the Corporation under other applicable law.

[3] At the same time, the court permitted the RTC to file an amended complaint adding statutory claims of gross negligence under Section 1821(k) to the federal common law claims made in the original complaint.

RTC's appeal with an appeal filed by the defendants in an unrelated suit brought by the RTC as receiver for United Savings and Loan of Trenton, New Jersey (United Savings). United Savings had been a state-chartered institution, and the negligence and breach of fiduciary duty claims asserted by the RTC against United Savings' former officers and directors were therefore based on New Jersey law. *Id.* at A9-A10. The district court in the *United Savings* case had rejected the defendants' motion to dismiss the RTC's state law claims as preempted by Section 1821(k), but had also certified its order for interlocutory appeal. *Id.* at A10.

2. The court of appeals (i) reversed the district court's dismissal of the RTC's federal common law negligence and breach of fiduciary duty claims against the City Fed officers and directors, and (ii) affirmed the district court's refusal to dismiss the RTC's state law claims against the United Savings defendants. Pet. App. A1-A37. It rejected the contention that Congress intended Section 1821(k) to constitute the exclusive standard governing officer and director liability, concluding instead that Section 1821(k) functions as a floor, ensuring the federal receiver's ability, irrespective of the law of the chartering authority, to recover for damages caused by the gross negligence (or even more culpable conduct) of officers or directors of federally insured institutions.

a. Looking first to the statutory text, the court concluded that the last sentence of Section 1821(k) (the savings clause) preserves the federal receiver's ability to seek recovery under "*all* 'other applicable law,' including the less forgiving negligence and fiduciary duty standards of care under state law and

federal common law." Pet. App. A13. The court rejected the defendants' suggestion that "other applicable law" refers only to the federal receiver's right to pursue administrative remedies under FIRREA, noting that when Congress intended elsewhere in FIRREA to limit its reference "to the law of a particular jurisdiction * * *, it did so with *specific* language." *Id.* at A14. The limited scope of Section 1821(k)'s substantive provision (*i.e.*, authorizing suits for gross negligence whether or not they were authorized by other laws) was, in the court's view, consistent with Congress's modest goal (as revealed by the legislative history) merely "to ensure that directors and officers of state-chartered institutions * * * not escape liability to the RTC under the shield of certain state laws that had effectively insulated them from claims based on their grossly negligent or reckless conduct." *Id.* at A23.

Turning to the question presented by the *United Savings* case, the court concluded that Section 1821(k) preempts only those state laws that would otherwise insulate officers and directors of state-chartered institutions from civil liability for gross negligence or other more culpable conduct. Pet. App. A24-A27. In the court's view, "Congress did not intend to hinder the RTC by denying it an opportunity to recover for instances of director and officer negligence when shareholders of these institutions would have had a right under state law before receivership, to bring such an action on behalf of the corporation." *Id.* at A27.

The court similarly held that Section 1821(k) does not displace the federal receiver's ability to bring suit against former officers or directors of federally chartered institutions under existing federal common

law. Pet. App. A27-A36. The court noted that, upon the receivership, the RTC obtained the rights that City Fed had itself possessed, which (petitioners conceded) included the right to bring an action against its officers and directors under federal common law. *Id.* at A28.[4] The savings clause, in the court's view, secured the RTC's rights in that regard. *Ibid.* The court held that Congress intended through Section 1821(k) to "address the question of what standard should apply in cases where the RTC was confronted with an applicable state insulating statute, * * * *not* * * * to define the standard of care applicable to federally chartered institutions governed by federal common law." *Id.* at A30.

The court did not decide "whether the federal common law standard is one of ordinary or gross negligence." Pet. App. A32 n.16. Rather, it directed the district court on remand "to permit the RTC to pursue any claims for negligence or breach of fiduciary duty available as a matter of federal common law." *Id.* at A37.[5]

Judge Mansmann concurred in part and dissented in part. Pet. App. A38-A50. She agreed with the majority that Section 1821(k)'s authorization of suits for gross negligence does not bar the federal receiver, in suits against officers or directors of state-chartered

[4] The court's analysis was premised on its understanding that "federal law exclusively governs [cases involving the liability of directors and officers] * * * when the institution is federally chartered, like City Federal." Pet. App. A10 n.5.

[5] In light of its view that Section 1821(k) does not govern suits by the federal receiver against officers or directors of federally chartered depository institutions, the court of appeals held that the RTC could not proceed with its claims for gross negligence under Section 1821(k). Pet. App. A37 n.17.

institutions, from asserting state law claims sounding in ordinary negligence or breach of fiduciary duty. *Id.* at A38. In her view, however, Section 1821(k) "spoke directly" to the issue of what standard of liability ought to be applied in suits by the federal receiver against officers or directors of federally chartered institutions and thereby precluded the application of any different standard based on federal common law. *Id.* at A50.

ARGUMENT

Petitioners contend that the court of appeals erred in holding that 12 U.S.C. 1821(k) does not supersede the federal receiver's ability to sue officers and directors of a failed federally chartered depository institution under federal common law, and they assert that the Court should grant certiorari in this case to resolve the conflict among the courts of appeals on that issue. In our view, the court of appeals' decision was correct, and is consistent with both the plain language of the statute and its legislative history. Although some circuits would have decided the issue of whether Section 1821(k) supersedes federal common law differently, it is not yet clear whether the difference between the Third Circuit and other circuits on that issue has any practical significance. The court of appeals remanded the case to the district court to decide what standard of liability governs under federal common law. If the lower courts ultimately conclude (as petitioners urge) that the standard to be applied under the federal common law is the same as the standard authorized by Section 1821(k) (gross negligence), the court of appeals' holding in this case will have no appreciable effect on petitioners or future defendants. Accordingly, the

issue resolved by the decision below does not warrant review at this time.[6]

1. Petitioners concede (see Pet. App. A28) that, before the receivership, City Fed had the right to bring claims against them under federal common law. They further concede (by arguing that Section 1821(k) "displaced" the federal receiver's federal common law rights) that the federal receiver would have succeeded to City Fed's ability to proceed under federal common law if City Fed had failed before the enactment of FIRREA. Petitioners argue (Pet. 10-20), however, that, by authorizing suits based on gross negligence, Section 1821(k) displaced the federal receiver's prior ability to assert claims based on the standard of liability that applies under federal common law, and created a uniform statutory standard of liability that now governs all suits by the federal receiver against officers and directors of failed federal depository institutions.

Petitioners' argument cannot be reconciled with the plain language of FIRREA. Under 12 U.S.C. 1821(d)(2)(A), the federal receiver succeeds to "all rights, titles, powers, and privileges of the insured depository institution." Thus, upon being appointed

---

[6] The Court will not ordinarily "issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Constr. Co.* v. *Jacksonville, T. & K.W. Ry.*, 148 U.S. 372, 384 (1893). The absence of a final judgment is "of itself alone sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see also *Virginia Military Institute* v. *United States*, 113 S. Ct. 2431 (1993) (Scalia, J., concurring in denial of cert.).

as receiver, the RTC obtained the right to assert City Fed's pre-existing federal common law claims against petitioners. See *O'Melveny & Myers* v. *FDIC*, 114 S. Ct. 2048, 2053-2054 (1994) (when FDIC sues as receiver, it does so with same rights, and subject to same defenses, as the failed institution). Nothing in the text of Section 1821(k) places any limitations on the federal receiver's rights in that regard.

Judging from its plain text, Section 1821(k) is not a limiting statute at all. Rather, it appears to create a special rule of decision to *supplement* the rights otherwise held by the federal receiver. It provides that "[a] director or officer * * * may be held personally liable for monetary damages in any civil action by * * * [the federal receiver] * * * for gross negligence, including any similar conduct that demonstrates a greater disregard of a duty of care (than gross negligence)." 12 U.S.C. 1821(k). That language authorizes the federal receiver to file suit for gross (or even more culpable) negligence, regardless of whether a gross negligence standard of liability is available under any other source of law. In thus *authorizing* the federal receiver to sue for gross negligence, the statute does not appear to *restrict* the receiver from suing for ordinary negligence under other applicable law. If Congress had meant to accomplish the latter preemptive objective, it would most naturally have provided that the receiver "may (and may only)" sue for gross (or greater) negligence. See *FDIC* v. *Canfield*, 967 F.2d 443, 446 (10th Cir.) (en banc) (citing *Rose* v. *Rose*, 481 U.S. 619, 626-627 (1987) ("may" establishes only discretionary power)), cert. dismissed, 506 U.S. 993 (1992); *FDIC* v. *McSweeney*,

976 F.2d 532, 537 (9th Cir. 1992), cert. denied, 113 S. Ct. 2440 (1993).

The limited purpose of the substantive provision of Section 1821(k) is underscored by the savings clause, which states that "[n]othing in [Section 1821(k)] shall impair or affect any right of [the federal receiver] under other applicable law." Petitioners' belie their claimed fidelity to the statutory text (Pet. 10-11) by contending, as they did below (Pet. App. A28), that "other applicable law" means only "other sections of FIRREA or State law." When Congress intended to refer only to the laws of particular jurisdictions or other provisions of FIRREA, it did so expressly. See, *e.g.*, 12 U.S.C. 1821(c)(3)(B) ("powers imposed by State law"); 12 U.S.C. 1821(e)(3)(C)(ii) ("except as otherwise specifically provided in this section"). It did not make such a limited reference here. In the absence of any limiting terms, "other applicable law" appears to mean *any* other applicable law. Cf. *Patterson* v. *Shumate*, 504 U.S. 753, 758 (1992) ("applicable nonbankruptcy law" means "any relevant nonbankruptcy law"); *id.* at 766 ("[T]he phenomenon that three Courts of Appeals could have thought ['applicable nonbankruptcy law'] a synonym for 'state law' is mystifying.") (Scalia, J., concurring).

It is incorrect, moreover, to suggest (Pet. 13) that a literal reading of the savings clause would rob the substantive provision of its intended meaning. That would be true only if, contrary to its text, the substantive provision was intended to establish a uniform standard of liability. If, on the other hand, as the text indicates, the substantive provision was intended only to ensure the federal receiver's ability, at a minimum, to file claims for gross negligence, it accomplishes that purpose while, at the same time,

the savings clause does significant service by emphasizing that the receiver is free, in addition, to pursue claims based on an ordinary negligence standard where applicable state law or federal common law authorizes such suits.

b. It would have been odd—particularly in light of Congress's stated desire to strengthen "the enforcement powers of Federal regulators of depository institutions" and "the civil sanctions * * * for defrauding or otherwise damaging depository institutions" (Pub. L. No. 101-73, § 101(9)-(10), 103 Stat. 187 (1989))—for Congress purposely to have insulated bank officers and directors from liability to the federal receiver under the federal common law standard that governed their conduct while they were serving as officers and directors and under which they could have been held liable in a suit brought by the institution before its demise. As the court of appeals concluded upon its review of the legislative history, Congress intended no such result.

Petitioners acknowledge (Pet. 14) that the legislative history of Section 1821(k) reflects that Congress's purpose was to "relieve the RTC and FDIC from the effects of certain so-called 'insulating' statutes passed by various states that required proof of intentional violations of the duty of care in order to recover civil money damages from officers and directors of corporations incorporated in those states." They assert, however, that Congress also intended to limit the federal receiver to suits based on gross or greater negligence—thus forbidding suits based on ordinary negligence—in order to avoid discouraging qualified individuals from serving as officers or directors of federally insured depository institutions. *Ibid.* That concern, however, derived

from Congress's desire not to interfere with the choice made by some States to impose liability on officers and directors of state-chartered institutions only for gross, rather than ordinary, negligence. Congress accordingly placed the federal statutory floor at gross negligence rather than ordinary negligence. *Ibid.* The report of the Senate Banking Committee makes clear, however, that Congress did not intend through Section 1821(k) to prevent the federal receiver "from pursuing claims under State law or other applicable Federal law, *if such law permits the officers or directors of a financial institution to be sued * * * for violating a lower standard of care, such as simple negligence.*" S. Rep. No. 19, 101st Cong., 1st Sess. 318 (1989) (emphasis added).[7]

2. The court of appeals held that Section 1821(k) has no application with respect to federally chartered depository institutions. The court inferred that the provision was not intended to apply to federally chartered institutions because the text "calls for the application of the 'applicable State law' formulation of gross negligence." Pet. App. A30-A31.

We agree with petitioners that the provision should be read to apply to federally chartered institutions.[8]

---

[7] Although the Senate Banking Committee report was not published until after the Senate passed the initial version of FIRREA, it was circulated six weeks before the Senate and the House enacted the final version of FIRREA. Pet. App. A20.

[8] Section 1821(k) provides that the FDIC may bring an action against an officer or director of an "insured depository institution." 12 U.S.C. 1821(k). "[I]nsured depository institution" is defined in FIRREA as "any bank or savings association the deposits of which are insured by the [FDIC] pursuant to this chapter." 12 U.S.C. 1813(c)(2). The FDIC insures both federal and state chartered institutions.

Petitioners acknowledge—indeed, assert (see pages 18-19, *infra*)—that the federal common law permits suits for gross negligence. The availability of the statutory claim in suits against the officers or directors of federally chartered institutions provides an option: The receiver may choose to bring its claims under Section 1821(k) when the gross negligence standard under "applicable state law" is more favorable than the federal common law standard applicable to claims that could have been brought by the federally chartered institution in its own right.

3. There is no conflict between the decision of the court of appeals and this Court's decision in *O'Melveny*. In *O'Melveny*, the Court held that the FDIC, asserting state law attorney malpractice claims as receiver for a failed state-chartered savings association, was subject to the same state law defenses with respect to the acts or omissions of the institution's officers and directors that would have been good against the savings association itself. The Court explained that, since the federal receiver stepped into the shoes of the failed state depository institution, the receiver must "work out its claims under state law, except where some provision in the extensive framework of FIRREA provides otherwise." *O'Melveny*, 114 S. Ct. at 2054. The Court observed that Section 1821(k) was such a provision, because it "permit[s] claims against directors and officers for gross negligence, regardless of whether state law would require greater culpability." *Ibid.*

The result below is consistent with this Court's reasoning in *O'Melveny*. City Fed, a federally char-

tered depository institution, had the right to assert claims against its officers and directors based on federal common law. In asserting those claims, City Fed's receiver is not asking for special treatment; it is merely exercising its right to assert claims to which it succeeded under FIRREA.

4. Although petitioners correctly observe (Pet. 20-22) that there is disagreement among the lower courts on the question presented, support for petitioners' position is not as uniform as petitioners suggest. The Sixth and Seventh Circuits have held that Section 1821(k) supplants federal common law and provides the exclusive basis for suits by the federal receiver against officers and directors of federally chartered depository institutions. See *FDIC* v. *Bates*, 42 F.3d 369 (6th Cir. 1994); *RTC* v. *Gallagher*, 10 F.3d 416 (7th Cir. 1993); but see *RTC* v. *Chapman*, 29 F.3d 1120, 1126-1128 (7th Cir. 1994) (Posner, C.J., dissenting) (criticizing *Gallagher* as incorrectly decided). Although the Tenth Circuit also adopted that position in *RTC* v. *Frates*, 52 F.3d 295 (1995), the stability of that holding is questionable. The Tenth Circuit had held previously, in *FDIC* v. *Canfield*, *supra*, that Section 1821(k) does not displace the ability of the federal receiver to sue officers and directors of state-chartered institutions under state law, having concluded that "'[m]ay' is a permissive term [that] does not imply a limitation on the standards of officer and director liability," and that "'other applicable law' means *all* 'other applicable law.'" 967 F.2d at 446. The panel in *Frates* was comprised of the only two judges who dissented from the en banc decision in *Canfield* and a district court judge sitting by designation, and it did not even attempt to explain how the same language within

Section 1821(k) can be read to displace federal common law claims but not preempt state law claims. Contra *RTC* v. *Fiala*, 870 F. Supp. 962, 969 (E.D. Mo. 1994) (declaring state/federal distinction "nonsensical").

Although the Fifth Circuit in *RTC* v. *Miramon*, 22 F.3d 1357 (1994), also held that Section 1821(k) displaced federal common law claims, the holding in *Miramon* is not precisely on point. *Miramon* involved an assertion of federal common law claims against officers and directors of a state-chartered institution. The court observed that, if the federal receiver could assert federal common law claims for negligence against officers and directors of state-chartered institutions, "the explicit language of the first sentence of section 1821(k) which enunciates a cause of action for gross negligence would be rendered a nullity." 22 F.3d at 1361. The court's premise was incorrect. The federal receiver may not ordinarily assert federal common law claims against the officers and directors of a state-chartered institution. See, *e.g.*, *Burks* v. *Lasker*, 441 U.S. 471, 476 (1979); cf. *Kamen* v. *Kemper Fin. Services, Inc.*, 500 U.S. 90 (1991). Indeed, if officers and directors of state-chartered institutions were generally subject to liability under federal common law, there would have been no need to enact Section 1821(k), since the existence of state insulating statutes would have posed no barrier to suits by the federal receiver.

In *FDIC* v. *McSweeney*, *supra*, the Ninth Circuit held that Section 1821(k) did not bar the FDIC from asserting negligence-based claims against the officers and directors of a failed state-chartered institution. Like the Third Circuit, the Ninth Circuit did not read the first sentence of Section

1821(k) "as a limitation on the types of claims that the FDIC may pursue," *McSweeney*, 976 F.2d at 537; and it similarly read the savings clause to preserve *all* other applicable law, *id.* at 538-539. The court did not decide whether the federal receivers' claims in that case arose under federal common law, because (the court explained), since "the FDIC stands in the shoes of the failed financial institution and its stockholders for purposes of pursuing claims against the institution's officials[,] * * * its rights to proceed against the officers for negligent breach of the duty of care, whether under state or federal common law, are preserved by the plain language of the last sentence of § 1821(k)." *Ibid.* See also *RTC* v. *Smith*, 872 F. Supp. 805, 815-816 (RTC's claims, "whether under state law or federal law, are not preempted under section 1821(k)"), amended on other grounds, 879 F. Supp. 1059 (D. Or. 1995).[9]

5. The concerns that underlie this Court's ordinary reluctance to grant interlocutory review counsel against granting review in this case. The court of appeals decided that the federal receiver was not barred by Section 1821(k) from asserting claims against City Fed's former officers and directors under federal common law. The content of the federal common law standard, however, is not clearly established. The court thus remanded the case to the district court to determine initially what standard of liability applies under federal common law.

[9] See also, *e.g.*, *RTC* v. *Gladstone*, 895 F. Supp. 356, 365-366 (D. Mass. 1995); *Fiala*, 870 F. Supp. at 967; *RTC* v. *King*, No. 4-93-258 (D. Minn. June 8, 1994), slip op. 13; *RTC* v. *Gibson*, 829 F. Supp. 1110, 1118 (W.D. Mo. 1993); *RTC* v. *Hess*, 820 F. Supp. 1359, 1364 (D. Utah 1993); *FDIC* v. *Nihiser*, 799 F. Supp. 904, 907-908 (C.D. Ill. 1992); contra, *e.g.*, *FDIC* v. *Harrington*, 844 F. Supp. 300, 304 (N.D. Tex. 1994); *FDIC* v. *Bates*, 838 F. Supp. 1216, 1220 (N.D. Ohio 1993), rev'd in part and remanded, 42 F.3d 369 (6th Cir. 1994).

If the lower courts agree with our submission that the federal common law standard of liability for officers and directors of federally chartered depository institutions is ordinary negligence,[10] and do not rule in petitioners' favor on other grounds, petitioners could again petition for certiorari, and this Court could then take the lower courts' determination respecting that issue into account in assessing the effect of Section 1821(k). See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979) (denial of petition at interlocutory stage without prejudice to renewal of questions presented when certiorari is sought from final judgment); *Urie* v. *Thompson*, 337 U.S. 163, 172-173 (1949); see also *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 409 U.S. 363, 365 n.1 (1973) (prior denial in this context does "not establish the law of the case or amount to *res judicata* on the points [later] raised").

The courts below may decide, however, that the *Briggs* standard does not govern. Some lower courts adjudicating cases involving federally chartered institutions have applied state law, without specifying whether the state law applies directly or rather as the appropriate rule of decision under federal common

[10] *Briggs* v. *Spaulding*, 141 U.S. 132, 152 (1891) ("that which ordinarily prudent and diligent men would exercise under similar circumstances"); see also *Bowerman* v. *Hamner*, 250 U.S. 504 (1919); see generally Gov't C.A. Br. 15-17.

law.[11] If the courts below turn to New Jersey law for the rule of decision and conclude that the standard of liability in New Jersey is gross negligence,[12] the standard applied in this case will be identical to the standard that would have been applied if this action had been decided in the Sixth, Seventh and Tenth Circuits, because Section 1821(k) (the exclusive source of law in those circuits) incorporates the gross negligence standard under applicable state law.

Petitioners have filed in the district court a motion to dismiss the complaint to the extent that it alleges claims based on ordinary negligence. They argue in support of the motion that, as a matter of uniform federal common law, "corporate officers and directors may only be held liable for conduct rising to the level of gross negligence (or a greater disregard of duty)." Memorandum of Law in Support of the Outside Directors' Motion to Dismiss the Third Amended Complaint 6. If the lower courts accept that view, petitioners and all other defendants in the Third Circuit will be in roughly the same position they would have been in had the court of appeals limited the federal receiver to a suit for gross negligence under

---

[11] See, *e.g.*, *Borgsmiller* v. *Burroughs*, 542 N.E.2d 1281 (App. Ct.), appeal denied, 548 N.E.2d 1066 (Ill. 1989); *Fields* v. *Sax*, 462 N.E.2d 983, 986 (Ill. App. Ct. 1984); *First Nat'l Bank* v. *Hall*, 238 S.E.2d 284 (Ga. Ct. App. 1977); *Bank of Am. Nat'l Trust & Sav. Ass'n* v. *Ryan*, 24 Cal. Rptr. 739, 744 (Cal. Dist. Ct. App. 1962); *Broadway Fed. Sav. & Loan Ass'n* v. *Howard*, 285 P.2d 61 (Cal. 1955).

[12] In the *United Savings* appeal, the RTC argued that the standard of liability under New Jersey law is ordinary negligence. Pet. App. A9.

Section 1821(k).[13] The conflict asserted by petitioners would make little, if any, practical difference in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

WILLIAM F. KROENER, III
General Counsel

JACK D. SMITH
Deputy General Counsel

ANN S. DUROSS
Assistant General Counsel

RICHARD J. OSTERMAN, JR.
JEROME A. MADDEN
Counsel
Federal Deposit Insurance Corporation

MARCH 1996

---

[13] There would be a difference only if and to the extent that the formulation adopted by the Third Circuit for the uniform federal common law gross negligence standard varies from the gross negligence formulation under "applicable state law."